

1 ERIC D. HOUSER (SBN 130079)  
BRENT A. KRAMER (SBN 256243)  
2 HOUSER & ALLISON, A Professional Corporation  
3 3760 Kilroy Airport Way, Suite 260  
Long Beach, CA 90806  
4 Telephone: (949) 679-1111  
5 Facsimile: (949) 679-1112  
Email: bkramer@houser-law.com  
6

7 Attorneys for Defendants, Ocwen Loan Servicing, LLC, erroneously sued as  
OCWEN FINANCIAL CORPORATION, and MORTGAGE ELECTRONIC  
8 REGISTRATION SYSTEMS, INC.

9 **UNITED STATES DISTRICT COURT**

10 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

11 Lillie Mae Washington  
12

13 Plaintiff,

14 vs.

15 AMERICAN HOME LOAN (CBSK  
16 FINANCIAL GROUP, INC. DBA) its  
17 successors and assignees, OCWEN  
FINANCIAL CORPORATION,  
18 MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, Inc., DE  
19 HDL Inc., Hisham Desouki,  
20 Christopher Cox, Jonathan Annett,  
21 LODS CAPITAL ESCROW Inc.,  
Nikki Hall, FOX FIELDS  
22 FINANCIAL, INC., Christopher Fox,  
23 and DOES 1-10 inclusive,

24 Defendants.  
25  
26  
27

Case No.: 2:09-8213 SJO (RZx)

Honorable: S. James Otero

**NOTICE OF MOTION AND  
MOTION TO DISMISS  
PLAINTIFF'S FIRST  
AMENDED COMPLAINT;  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**

**[Fed.R.Civ.P. 12(b)(6)]**

[Request for Judicial Notice filed  
concurrently herewith]

[Proposed Order lodged  
concurrently herewith]

DATE: July 26, 2010

TIME: 10:00 a.m.

DEPT: 1

1 **TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

2 **PLEASE TAKE NOTICE** that on July 26, 2010, at 10:00 a.m., or as soon  
 3 thereafter as the matter may be heard, in Department 1 of the above-entitled Court,  
 4 located at 312 N. Spring Street, Los Angeles CA, Defendants, Ocwen Loan  
 5 Servicing, LLC, erroneously sued as OCWEN FINANCIAL CORPORATION  
 6 ("Ocwen"), and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,  
 7 INC. ("MERS") (collectively "Defendants"), will and hereby do move the Court to  
 8 dismiss the Complaint of Plaintiff LILLIE MAE WASHINGTON ("Plaintiff")  
 9 with prejudice.

10 The Motion to Dismiss is made and based upon Federal Rule of Civil  
 11 Procedure 12(b)(6), and on the grounds that the causes of action contained in  
 12 Plaintiff's Complaint fail to state a claim upon which relief can be granted. The  
 13 Motion is based upon this Notice of Motion, the Memorandum of Points and  
 14 Authorities, and upon all pleadings, papers, and documents on file herein, as well  
 15 as any oral argument which may be presented at the time of the hearing or any  
 16 matters of which judicial notice is requested and/or taken.

17 Pursuant to L.R. 7-3, a conference of counsel was not conducted because  
 18 counsel for Defendants attempted to meet and confer by e-mail and telephone and  
 19 did not receive any response thereto.

20 Dated: June 17, 2010

**HOUSER & ALLISON**  
 A Professional Corporation

s/ Brent A. Kramer

Brent A. Kramer  
 Attorneys for Defendants  
 Ocwen Loan Servicing, LLC, and  
 MORTGAGE ELECTRONIC  
 REGISTRATION SYSTEMS, INC.

28 **NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STATEMENT OF FACTS .....	1
III.	PLAINTIFF'S ENTIRE COMPLAINT FAILS TO SATISFY FED. R. CIV. P. 8(A).....	2
IV.	PLAINTIFF'S TILA CLAIM FAILS BECAUSE THE CLAIM IS TIME- BARRED, BECAUSE THERE ARE NO FACTUAL ALLEGATIONS OF A TILA VIOLATION AGAINST OCWEN OR MERS, AND BECAUSE OCWEN IS EXEMPT FROM TILA.....	2
	A. The TILA Claim Is Time-Barred. ....	2
	B. There are No Allegations that Either Ocwen or MERS acted at Loan .... Origination.....	3
	C. Loan servicers like Ocwen are exempt from TILA. ....	4
V.	PLAINTIFF RESPA CLAIM FAILS BECAUSE THE CLAIM IS TIME- BARRED AND BECAUSE PLAINTIFF FAILS TO ALLEGE ACTUAL DAMAGES .....	5
	A. Plaintiff's RESPA Claim is Time-Barred. ....	5
	B. The RESPA Claim Fails Because Plaintiff Does Not Allege Actual .....	5
VI.	PLAINTIFF'S RESCISSION OF CONTRACT CLAIM FAILS BECAUSE THERE IS NO ALLEGED CONTRACT BETWEEN PLAINTIFF AND EITHER OCWEN OR MERS, AND PLAINTIFF'S UNDERLYING TILA CLAIM FAILS.....	6
VII.	PLAINTIFF'S PREDATORY LENDING CLAIM FAILS BECAUSE PLAINTIFF DOES NOT ALLEGE A COVERED LOAN AND NEITHER OCWEN NOR MERS IS ALLEGED TO HAVE ORIGINATED A COVERED LOAN.....	6

1	A. Plaintiff Fails to Allege Facts Showing She Obtained a Covered .....	6
2	B. Cal. Fin. Code § 4973 Applies Only To A Person Who Originates.....	8
3	VIII. PLAINTIFF'S DECLARATORY RELIEF CLAIM FAILS BECAUSE	
4	PLAINTIFF ADMITS SHE BREACHED THE PROMISSORY NOTE AND	
5	DEED OF TRUST. ....	8
6	IX. PLAINTIFF'S INJUNCTIVE RELIEF CLAIM FAILS BECAUSE	
7	INJUNCTIVE RELIEF IS NOT A SEPARATE CAUSE OF ACTION. ....	9
8	X. PLAINTIFF'S UNJUST ENRICHMENT CLAIM FAILS BECAUSE	
9	THERE ARE NO SPECIFIC ALLEGATIONS AGAINST OCWEN OR	
10	MERS THAT THEY UNJUSTLY RECEIVED AND RETAINED	
11	BENEFITS AS A RESULT OF MISTAKE, FRAUD, COERCION. ....	9
12	XI. PLAINTIFF'S CAL. BUS. & PROF. CODE §§ 17200 CLAIM FAILS	
13	BECAUSE PLAINTIFF DOES NOT ALLEGE PERSONAL	
14	PARTICIPATION BY OCWEN OR MERS, FAILS TO ALLEGE THE	
15	CLAIM WITH PARTICULARITY, AND FAILS TO ALLEGE ONGOING	
16	CONDUCT. ....	10
17	XII. PLAINTIFF'S FRAUD CLAIM FAILS BECAUSE PLAINTIFF HAS NOT	
18	ALLEGED THE CLAIM WITH SUFFICIENT PARTICULARITY. ....	11
19	XIII. PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM FAILS	
20	BECAUSE PLAINTIFF HAS NOT ALLEGED ALL REQUIRED	
21	ELEMENTS AND BECAUSE THE CLAIM HAS NOT BEEN ALLEGED	
22	WITH SUFFICIENT PARTICULARITY. ....	12
23	XIV. PLAINTIFF'S CLRA CLAIM FAILS BECAUSE PLAINTIFF DOES NOT	
24	ALLEGE A CLAIM AGAINST OCWEN OR MERS SPECIFICALLY,	
25	AND BECAUSE THE STATUTE DOES NOT APPLY TO REAL	
26	PROPERTY. ....	13

XV. PLAINTIFF’S BREACH OF FIDUCIARY DUTIES CLAIM FAILS	
BECAUSE NEITHER OCWEN NOR MERS IS A FIDUCIARY OF THE	
BORROWER.....	14
XVI. PLAINTIFF’S FINANCIAL ABUSE OF ELDERS CLAIM FAILS	
BECAUSE NEITHER OCWEN NOR MERS IS ALLEGED TO HAVE	
COMMITTED ANY WRONGDOING. ....	15
XVII. CONCLUSION .....	16

## TABLE OF AUTHORITIES

### **Cases**

<i>Aguero v. Mortgageit, Inc.</i> , 2009 WL 2486311, at *3 (E.D.Cal. Aug. 12, 2009).....	7
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	2
<i>Bennett v. Suncloud</i> , 56 Cal. App. 4 <sup>th</sup> 91 (1997) .....	10
<i>Decker v. Glenfed, Inc.</i> , 42 F.3d 1541, 1548 (9th Cir. 1994).....	11
<i>Emery v. Visa International Service Association</i> , 95 Cal.App.4th 952, 960 (Cal. Ct. App. 2002) .....	10
<i>Fox v. Pollack</i> , 181 Cal.App.3d 954, 962 (Cal. Ct. App. 1986).....	12
<i>Gutierrez v. Ocwen Loan Servicing, LLC</i> , 2009 WL 426606, at *4 (E.D.Cal. Feb. 20, 2009) .....	8
<i>Gwin v. Pacific Coast Financial Services</i> , 2010 WL 1691567, at *7 (S.D.Cal. Apr. 23, 2010) .....	15
<i>Haskin v. R.J. Reynolds Tobacco Co.</i> , 995 F.Supp. 1437, 1439 (M.D.Fla.1998)...12	
<i>Hughes v. Residential Mortg. Capital</i> , 2009 WL 5215748, at *5 (N.D.Cal. Dec. 29, 2009) .....	5
<i>Hutchinson v. Delaware Sav. Bank FSB</i> , 410 F.Supp.2d 374, 383 (D.N.J.2006).....	5
<i>Irwin v. Dep't of Veterans Affairs</i> 498 U.S. 89, 96 (1990) .....	3
<i>Khoury v. Maly's of California, Inc.</i> , 14 Cal. App. 4 <sup>th</sup> 612, 619 (1993) .....	10
<i>King v. State of California</i> , 784 F.2d 910, 915 (9th Cir. 1986).....	3
<i>Lazar v. Superior Court</i> , 12 Cal.4th 631, 638 (1996).....	11
<i>Lectrodryer v. Seoul Bank</i> (2000) 77 Cal.App.4th 723, 726 .....	9
<i>McElhany v. W.E. Moyer &amp; Co.</i> , 101 Cal.App. 53, 57 (Cal. Ct. App. 1929).....	6
<i>Meyer v. Ameriquet Mortg. Co.</i> , 342 F.3d 899, 902 (9th Cir. 2003) .....	3
<i>Moore v. Kayport Package Express, Inc.</i> , 885 F.2d 531, 540 (9th Cir. 1989).....	11
<i>Moore v. Kayport Package Express, Inc.</i> , 885 F.2d 531, 541 (9th Cir.1989).....	12



1	<i>Oaks Management Corp. v. Superior Court</i> , 145 Cal.App.4th 453, 466 (Cal. Ct.	
2	App. 2006) .....	14
3	<i>O'Donnell v. Vencor, Inc.</i> , 465 F.3d 1063, 1068 (9th Cir. 2006) .....	3
4	<i>Pierce v. Lyman</i> , 1 Cal.App.4th 1093, 1101 (Cal. Ct. App. 1991).....	14
5	<i>Price v. Wells Fargo Bank</i> , 213 Cal.App.3d 465, 476 (1989).....	14
6	<i>Rangel v. DHI Mortgage Co., Ltd.</i> , 2009 WL 2190210, at *3 (E.D.Cal. July 21,	
7	2009) .....	14
8	<i>Roberts v. Lomanto</i> , 112 Cal.App.4th 1553, 1562 (Cal. Ct. App. 2003) .....	14
9	<i>See Neilson v. Union Bank of Cal., N.A.</i> , 290 F.Supp.2d 1101, 1141 (C.D.Cal.	
10	2003) .....	13
11	<i>Shamsian v. Atlantic Richfield Co.</i> , 107 Cal. App. 4th 967, 984-85 (2003) .....	9
12	<i>Shell Oil Co. v. Richter</i> , 52 Cal. App. 2d 164, 168 (1942).....	9
13	<i>State of California ex rel. Van de Kamp v. Texaco, Inc.</i> , 46 Cal.3d 1147, 1169-	
14	1170 (1988) .....	11
15	<i>Swartz v. KPMG LLP</i> , 476 F.3d 756, 764-765 (9th Cir.2007) .....	12
16	<i>Vega v. JPMorgan Chase Bank, N.A.</i> , 654 F.Supp.2d 1104, 113 (E.D.Cal. 2009)...	5
17	<i>Vess v. Ciba-Geigy Corp. USA</i> , 317 F.3d 1097, 1106 (9th Cir.2003).....	11
18	<i>Walters v. Fidelity Mortg. Of Cal.</i> , 2010 WL1493131 *12 (E.d.Cal., 2010).....	10
19	<i>Williams v. Gerber Products Co.</i> , 552 F2d 934, 938, (9th Cir. 2008) .....	14
20	<i>Yerington Ford, Inc. v. Gerard Motors Acceptance Corp.</i> 359 F.Supp.2d 1075,	
21	1092 (D.Nev. 2004) .....	14
22	<i>Yerington Ford, Inc. v. Gerard Motors Acceptance Corp.</i> , 359 F.Supp.2d 1075,	
23	1092 (D.Nev. 2004) .....	14
24	<b>Statutes</b>	
25	12 U.S.C. § 2605(f)(1)(A).....	5
26	12 U.S.C. § 2614.....	5
27	15 U.S.C. § 1640.....	4

1	15 U.S.C. § 1640 (e) .....	3
2	15 U.S.C. § 1641 .....	4
3	15 U.S.C. § 1641(f).....	4
4	Bus. & Prof. Code §§ 17200.....	2
5	Cal Fin. Code, § 4973 .....	7
6	Cal. Bus. & Prof. Code § 17200 .....	11
7	Cal. Bus. and Prof. Code § 17200.....	1, 11
8	Cal. Civ. Code 1770.....	13
9	<i>Cal. Fin. Code</i> § 4970(b) .....	7
10	Cal. Fin. Code § 4973 .....	8
11	Cal. Fin. Code § 4973(f)(1).....	8
12	Cal. Fin. Code §4970(b)(1).....	6
13	Cal. Welf. & Inst.Code § 15610.30(a)(1)-(2) .....	15
14	<i>Civil Code</i> § 1761(d).....	13
15	Fed. R. Civ. P. 8(a).....	1
16	Fed.R.Civ.P. 9(b) .....	11

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff alleges a myriad of claims (thirteen in all) against Defendants, Ocwen and MERS. However, Plaintiff's First Amended Complaint is beset by a number of problems, including basic pleading defects. For instance, Plaintiff does not put any of the Defendants on proper notice of the claims against them, and therefore fails to meet the required pleading standards under Fed. R. Civ. P. 8(a), not does Plaintiff allege either fraud or negligent misrepresentation with the particularity required under Fed. R. Civ. P. 9(b). Moreover, Plaintiff's statutory claims under TILA, RESPA, predatory lending, Cal. Bus. and Prof. Code § 17200, the Consumer Legal Remedies Act, and abuse of elders, all fail. The bottom line is that Plaintiff's claims are all deficient as pled. Thus, Plaintiff's FAC should be dismissed with prejudice.

### II. STATEMENT OF FACTS

On October 20, 2006, Plaintiff Lillie Mae Washington ("Plaintiff") and Hobert Washington executed a Deed of Trust with respect to the property located at 2315, 2315 ¼, 2315 ½ Hauser Boulevard, Los Angeles, CA 90016 (the "Subject Property"). *See Exhibit 1* to the Request for Judicial Notice ("RJN"). The Deed of Trust was security for a loan in the amount of \$335,000.00 from lender, CBSK Financial Group Inc., dba American Home Loans. *See Exhibit 1* to the RJN.

On November 13, 2009, Plaintiff filed a Complaint alleging six causes of action for (1) violation of Truth in Lending Act, (2) violation of the Real Estate Settlement Procedures Act, (3) change of venue for state law causes of action, (4) violation of California Civil Code section 2923.6, (5) violations of Securities and Exchange Commission Rules and Regulations and US Securities Laws, and (6) violation of California Rosenthal Act.

On May 24, 2010, Plaintiff filed a First Amended Complaint (“FAC”), alleging claims for (1) violation of TILA; (2) violation of RESPA; (3) Rescission of Contract; (4) Predatory Lending; (5) Declaratory Relief; (6) Injunctive Relief; (7) Unjust Enrichment; (8) Unfair Competition Under Bus. & Prof. Code §§ 17200 et seq.; (9) Fraud; (10) Negligent Misrepresentation; (11) Violation of the Consumer Legal Remedies Act; (12) Breach of Fiduciary Duties; and (13) Financial Abuse of Elders.

### **III. PLAINTIFF’S ENTIRE COMPLAINT FAILS TO SATISFY FED. R. CIV. P. 8(A).**

Rule 8(a)(2) requires a “short and plain statement of the claim showing that the pleader is entitled to relief,” in order to give the defendant fair notice of what the claim is and the grounds on which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiff’s FAC fails to differentiate between each defendant in her claims, and alleges claims against “Defendants.” Accordingly, Plaintiff does not give fair notice of what the claim is against each defendant and therefore Plaintiff’s entire Complaint should be dismissed.

### **IV. PLAINTIFF’S TILA CLAIM FAILS BECAUSE THE CLAIM IS TIME-BARRED, BECAUSE THERE ARE NO FACTUAL ALLEGATIONS OF A TILA VIOLATION AGAINST OCWEN OR MERS, AND BECAUSE OCWEN IS EXEMPT FROM TILA.**

Plaintiff’s first claim is for violation of the Truth in Lending Act (“TILA”). See FAC, ¶¶ 38-43. However, this claim fails because (a) the TILA claim is time-barred, (b) there are no factual allegations tying Ocwen or MERS to purported TILA disclosure violations, and (c) Ocwen is exempt from TILA.

#### **A. The TILA Claim Is Time-Barred.**

Plaintiff’s TILA claim is for damages based on alleged improprieties in connection with the TILA disclosures. See FAC, ¶¶ 39-43. However, Plaintiff’s

1 damage claims relating to improper disclosures are subject to a one-year statute of  
 2 limitations, 15 U.S.C. § 1640 (e), which runs from the time the loan transaction is  
 3 consummated. *See King v. State of California*, 784 F.2d 910, 915 (9th Cir. 1986);  
 4 *see also Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902 (9th Cir. 2003)  
 5 (failure to make the required disclosures under TILA occurs at the time the loan  
 6 documents were signed.).

7 Plaintiff alleges, and Plaintiff's Deed of Trust indicates, that she executed  
 8 closing documents for her loan in October, 2006. *See* FAC, ¶ 23. Plaintiff,  
 9 however, did not file this lawsuit until November 13, 2009, more than one year  
 10 after the loan documents were signed. Plaintiff's request for monetary damages  
 11 under TILA is therefore time-barred.

12 Plaintiff cannot avail herself of equitable tolling to avoid the one-year  
 13 limitations period under TILA. Under California law, "[e]quitable tolling is  
 14 generally applied in situations 'where the claimant has actively pursued his judicial  
 15 remedies by filing a defective pleading during the statutory period, or where the  
 16 complainant has been induced or tricked by his adversary's misconduct into  
 17 allowing the filing deadline to pass.'" *O'Donnell v. Vencor, Inc.*, 465 F.3d 1063,  
 18 1068 (9th Cir. 2006) (quoting *Irwin v. Dep't of Veterans Affairs* 498 U.S. 89, 96  
 19 (1990)).

20 Plaintiff's FAC does not allege *any facts* demonstrating entitlement to  
 21 equitable tolling. Plaintiff merely alleges the "hidden nature of this violation"  
 22 without more. FAC, ¶ 40. Accordingly, Plaintiff's TILA damages claim fails and  
 23 should be dismissed with prejudice.

24 **B. There are No Allegations that Either Ocwen or MERS acted at**  
 25 **Loan Origination.**

26 Plaintiff's TILA claim concerns the purported failure to provide disclosures  
 27 at loan origination. *See* FAC, ¶¶ 38-43. However, neither Ocwen nor MERS is  
 28 alleged to have had any connection with the origination of the loan, and therefore

1 there are no factual allegations specifically relating to conduct by either Ocwen or  
 2 MERS that may be deemed a violation of TILA. Thus, Plaintiff's TILA claim fails  
 3 and should be dismissed with prejudice.

4 **C. Loan servicers like Ocwen are exempt from TILA.**

5 The only parties who can be liable for TILA violations are the original  
 6 creditor, 15 U.S.C. § 1640, and assignees of that creditor, 15 U.S.C. § 1641. TILA  
 7 specifically exempts loan servicers (like Ocwen) from its provisions:

8 (1) A servicer of a consumer obligation arising from a  
 9 consumer credit transaction **shall not be treated**  
 10 **as an assignee** of such obligation for purposes of  
 11 this section **unless the servicer is or was the**  
 12 **owner of the obligation.**

13 (2) A servicer of a consumer obligation arising from a  
 14 consumer credit transaction shall not be treated as  
 15 the owner of the obligation for purposes of this  
 16 section on the basis of an assignment of the  
 17 obligation from the creditor or another assignee to  
 18 the servicer solely for the administrative  
 19 convenience of the servicer in servicing the  
 20 obligation." (Emphasis Added.)

21 15 U.S.C. § 1641(f).

22 Ocwen is merely the loan servicer for Plaintiff's loan. Plaintiff has not, and  
 23 cannot, allege that Ocwen is or was the owner of the loan at any time. Thus,  
 24 Ocwen is not subject to liability under TILA as a matter of law and insofar as it is  
 25 based on TILA, Plaintiff's first claim fails as to Ocwen and should be dismissed  
 26 with prejudice.

27 ///

28 ///

///

1 **V. PLAINTIFF RESPA CLAIM FAILS BECAUSE THE CLAIM IS**  
 2 **TIME-BARRED AND BECAUSE PLAINTIFF FAILS TO ALLEGE**  
 3 **ACTUAL DAMAGES**

4 Plaintiff's second claim is for violation of RESPA. *See* FAC, ¶¶ 44-47.  
 5 However, Plaintiff's claim fails because (a) it is time-barred, and (b) Plaintiff fails  
 6 to allege actual damages.

7 **A. Plaintiff's RESPA Claim is Time-Barred.**

8 First, Plaintiff's RESPA claim fails because it is time-barred by a one-year  
 9 statute of limitations. 12 U.S.C. § 2614. *See Hughes v. Residential Mortg.*  
 10 *Capital*, 2009 WL 5215748, at \*5 (N.D.Cal. Dec. 29, 2009). Plaintiff executed  
 11 the loan documents on or around October 20, 2006, more than one year before  
 12 filing suit on November 13, 2009. Additionally, as stated above, Plaintiff fails to  
 13 plead any basis for equitable tolling. *See* FAC, ¶¶ 44-47. Accordingly, Plaintiff's  
 14 RESPA claim is time-barred and should be dismissed with prejudice.

15 **B. The RESPA Claim Fails Because Plaintiff Does Not Allege Actual**  
 16 **Damages.**

17 Under RESPA, a Plaintiff must allege actual damages by the alleged  
 18 RESPA violation. *See* 12 U.S.C. § 2605(f)(1)(A) ("Whoever fails to comply with  
 19 this section shall be liable to the borrower ... [for] any actual damages to the  
 20 borrower as a result of the failure ....") "[A]lleging a breach of RESPA duties  
 21 alone does not state a claim under RESPA. Plaintiffs must, at a minimum, also  
 22 allege that the breach resulted in actual damages." *Vega v. JPMorgan Chase*  
 23 *Bank, N.A.*, 654 F.Supp.2d 1104, 113 (E.D.Cal. 2009) (quoting *Hutchinson v.*  
 24 *Delaware Sav. Bank FSB*, 410 F.Supp.2d 374, 383 (D.N.J.2006). Plaintiff has not  
 25 alleged actual damages. *See* FAC, ¶¶ 44-47. Accordingly, Plaintiff's RESPA  
 26 claim fails and should be dismissed with prejudice.

27 ///

28 ///



1 **VI. PLAINTIFF'S RESCISSION OF CONTRACT CLAIM FAILS**  
 2 **BECAUSE THERE IS NO ALLEGED CONTRACT BETWEEN**  
 3 **PLAINTIFF AND EITHER OCWEN OR MERS, AND PLAINTIFF'S**  
 4 **UNDERLYING TILA CLAIM FAILS.**

5 Plaintiff's third claim is for rescission of contract. See FAC ¶¶ 48-51.  
 6 However, there is no contract alleged to have existed between either Ocwen or  
 7 MERS. See FAC ¶¶ 48-51. "An action for rescission must of necessity rest upon  
 8 the existence of a contract to be rescinded." *McElhany v. W.E. Moyer & Co.*, 101  
 9 Cal.App. 53, 57 (Cal. Ct. App. 1929). Moreover, Plaintiff bases her rescission  
 10 claim on purported violations of TILA. For the reasons stated in Section IV,  
 11 *supra*, Plaintiff's TILA claim fails as to Ocwen and MERS. Accordingly,  
 12 Plaintiff's third claim fails and should be dismissed with prejudice.

13 **VII. PLAINTIFF'S PREDATORY LENDING CLAIM FAILS BECAUSE**  
 14 **PLAINTIFF DOES NOT ALLEGE A COVERED LOAN AND**  
 15 **NEITHER OCWEN NOR MERS IS ALLEGED TO HAVE**  
 16 **ORIGINATED A COVERED LOAN.**

17 Plaintiff's fourth claim is for predatory lending. See FAC ¶¶ 52-55.  
 18 However, Plaintiff's claim fails because there are no allegations that she obtained a  
 19 covered loan, or that any of the defendants originated a covered loan.  
 20 Accordingly, Plaintiff's fourth claim fails and should be dismissed with prejudice.

21 **A. Plaintiff Fails to Allege Facts Showing She Obtained a Covered**  
 22 **Loan.**

23 California's predatory lending law only prohibits certain acts in relation to  
 24 "covered loans." The term "covered loan" is defined under Cal. Fin. Code  
 25 §4970(b)(1) as follows:  
 26

27 (b)"Covered loan" means a consumer loan in which  
 28 the original principal balance of the loan does not  
 exceed the most current conforming loan limit for a  
 single-family first mortgage loan established by the  
 Federal National Mortgage Association in the case of



1 a mortgage or deed of trust, **and where one of the**  
 2 **following conditions are met:**

3 (1) For a mortgage or deed of trust, the annual  
 4 percentage rate at consummation of the transaction  
 5 will exceed by more than eight percentage points the  
 6 yield on Treasury securities having comparable  
 7 periods of maturity on the 15th day of the month  
 8 immediately preceding the month in which the  
 9 application for the extension of credit is received by  
 10 the creditor.

11 (2) The total points and fees payable by the consumer  
 12 at or before closing for a mortgage or deed of trust  
 13 will exceed 6 percent of the total loan amount.

14 *Cal. Fin. Code* § 4970(b). (Emphasis added).

15 Plaintiff fails to allege (a) the most current conforming loan limit, (b) that  
 16 the principal of her loan is within the conforming loan limits for a single family  
 17 mortgage loan established by the Federal National Mortgage Association, (c) that  
 18 the transaction exceeded the applicable interest rate by more than eight percentage  
 19 points, or (d) the total points and fees payable by the consumer at or before closing  
 20 exceeded 6 percent of the total loan amount. *See* FAC ¶¶ 52-55. Plaintiff does not  
 21 even offer the interest rate or any specifics of the loan in question. Therefore,  
 22 Plaintiff does not state facts sufficient to establish the threshold requirement for  
 23 application of *Cal. Fin. Code*, § 4973. *See Aguero v. Mortgageit, Inc.*, 2009 WL  
 24 2486311, at \*3 (E.D.Cal. Aug. 12, 2009) (holding that failure to “allege either that  
 25 the annual percentage rate at consummation of the transaction exceeded the  
 26 Treasury securities rate by more than eight percentage points or that the total points  
 27 and fees paid by the consumer at or before closing exceeded six percent of the total  
 28 loan amount” warranted dismissal of predatory lending cause of action).  
 Accordingly, because Plaintiff does not allege a covered loan, her fourth claim  
 fails and should be dismissed with prejudice.

1                   **B. Cal. Fin. Code § 4973 Applies Only To A Person Who Originates**  
 2                   **Covered Loans.**

3                   In addition, Cal. Fin. Code § 4973 applies only to “a person who originates  
 4 covered loans.” Cal. Fin. Code § 4973(f)(1). It is undisputed that neither Ocwen  
 5 nor MERS was the originator of Plaintiff’s loan.

6                   In *Gutierrez v. Ocwen Loan Servicing, LLC*, 2009 WL 426606, at \*4  
 7 (E.D.Cal. Feb. 20, 2009), plaintiff brought a predatory lending claim against  
 8 Ocwen. However, the Court dismissed the predatory lending claim, holding that  
 9 there was no allegation that “Ocwen was involved with the transaction that forms  
 10 the basis of his predatory lending claim.”

11                  The same rationale should apply here. Neither Ocwen nor MERS is the  
 12 loan originator, and was not involved with the transaction that forms the basis of  
 13 Plaintiff’s predatory lending claim. The Deed of Trust attached to the FAC state  
 14 that the lender is CBSK Financial Group, Inc. dba American Home Loans. *See*  
 15 **Exhibit A** to the FAC. Ocwen cannot be liable for any violations of Section 4973  
 16 that may have been committed by the originating lender. Accordingly, Plaintiff’s  
 17 fourth claim fails and should be dismissed with prejudice.

18                   **VIII. PLAINTIFF’S DECLARATORY RELIEF CLAIM FAILS BECAUSE**  
 19                   **PLAINTIFF ADMITS SHE BREACHED THE PROMISSORY NOTE**  
 20                   **AND DEED OF TRUST.**

21                  Plaintiff’s fifth claim is for declaratory relief. *See* FAC, ¶¶ 56-57. Plaintiff  
 22 alleges that she “desires a judicial determination ... that Plaintiff did not breach the  
 23 terms of the Promissory Note and Deed of Trust.” *See* FAC, ¶ 57. However,  
 24 Plaintiff presents no allegations in her FAC which would permit the Court to reach  
 25 a determination that she did not breach of the promissory note and deed of trust. In  
 26 fact, Plaintiff alleges that “[o]n or about October, 2009, Plaintiff could not continue  
 27 to pay the overwhelmingly large payments each month and was forced to make her  
 28 last monthly payment to date on the mortgage.” *See* FAC, ¶ 34. Thus, there is no

1 basis for holding that Plaintiff did not breach the Promissory Note and Deed of  
 2 Trust. Accordingly, Plaintiff's fifth claim fails and should be dismissed with  
 3 prejudice.

4 **IX. PLAINTIFF'S INJUNCTIVE RELIEF CLAIM FAILS BECAUSE**  
 5 **INJUNCTIVE RELIEF IS NOT A SEPARATE CAUSE OF ACTION.**

6 Plaintiff's sixth claim is for injunctive relief. *See* FAC ¶¶ 58-60. However,  
 7 Plaintiff's injunctive relief action is procedurally improper because neither  
 8 preliminary nor permanent injunctive relief, by itself, is a cause of action; a  
 9 substantive cause of action must exist before injunctive relief can be granted. *Shell*  
 10 *Oil Co. v. Richter*, 52 Cal. App. 2d 164, 168 (Cal. Ct. App. 1942); *see also*  
 11 *Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 984-85 (Cal. Ct. App.  
 12 2003). Furthermore, for the reasons stated throughout this Motion, each of  
 13 Plaintiff's underlying claims which would support her claim for injunctive relief  
 14 fails. Thus, Plaintiff's injunctive relief claim fails and should be dismissed with  
 15 prejudice.

16 **X. PLAINTIFF'S UNJUST ENRICHMENT CLAIM FAILS BECAUSE**  
 17 **THERE ARE NO SPECIFIC ALLEGATIONS AGAINST OCWEN OR**  
 18 **MERS THAT THEY UNJUSTLY RECEIVED AND RETAINED**  
 19 **BENEFITS AS A RESULT OF MISTAKE, FRAUD, COERCION.**

20 Plaintiff's seventh claim is for unjust enrichment. *See* FAC ¶¶ 61-65.  
 21 Plaintiff alleges that "Defendants acknowledged, accepted, and benefited from  
 22 Plaintiff's agreement to enter into the loan." FAC, ¶ 64.

23 As alleged, Plaintiff's claim does not provide either Ocwen or MERS with  
 24 adequate notice of Plaintiff's allegations. To prove a claim for unjust  
 25 enrichment/restitution, Plaintiff must properly allege a receipt of a benefit by  
 26 Ocwen or MERS and unjust retention thereof at the expense of Plaintiff.  
 27 *Lectrodryer v. Seoul Bank*, 77 Cal.App.4th 723, 726 (2000). Further, Plaintiff  
 28 must demonstrate that Ocwen or MERS received the benefit as a result of a

1 mistake, fraud, or coercion. *Walters v. Fidelity Mortg. of Cal.*, 2010 WL1493131,  
2 at \*12 (E.D.Cal. Apr. 14, 2010).

3 Here, Plaintiff has not alleged any facts demonstrating an unjust receipt and  
4 retention of a benefit by Ocwen or MERS, or that Ocwen or MERS received the  
5 benefit as a result of mistake, fraud or coercion. Plaintiff merely lumped Ocwen  
6 and MERS together with the remaining defendants and recited the elements of the  
7 claim. Plaintiff's allegations do not meet Plaintiff's pleading burden and do not  
8 provide Ocwen and MERS with proper notice of Plaintiff's claim. Therefore,  
9 Plaintiff's claim fails and should be dismissed with prejudice.

10 **XI. PLAINTIFF'S CAL. BUS. & PROF. CODE §§ 17200 CLAIM FAILS**  
11 **BECAUSE PLAINTIFF DOES NOT ALLEGE PERSONAL**  
12 **PARTICIPATION BY OCWEN OR MERS, FAILS TO ALLEGE THE**  
13 **CLAIM WITH PARTICULARITY, AND FAILS TO ALLEGE**  
14 **ONGOING CONDUCT.**

15 Plaintiff's eighth claim is for violation of Cal. Bus. & Prof. Code §§ 17200.  
16 See FAC ¶¶ 66-71. However, to state a valid claim, Ocwen and MERS' liability  
17 must be based on allegations of its personal participation in the unlawful practices.  
18 "The concept of vicarious liability has no application to actions brought under the  
19 unfair business practices act." *Emery v. Visa International Service Association*, 95  
20 Cal.App.4th 952, 960 (Cal. Ct. App. 2002) ("A defendant's liability must be based  
21 on his personal 'participation in the unlawful practices' and 'unbridled control'  
22 over the practices that are found to violate section 17200.")

23 There are no specific factual allegations against Ocwen or MERS at all in  
24 the Complaint, much less allegations of their personal participation in any unfair  
25 or unlawful practices. See FAC, 66-71. "A plaintiff must state with reasonable  
26 particularity the facts supporting the statutory elements of the violation [under §  
27 17200]." *Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4<sup>th</sup> 612, 619 (Cal. Ct.  
28 App. 1993). See *Bennett v. Suncloud*, 56 Cal. App. 4<sup>th</sup> 91 (Cal. Ct. App. 1997)



(dismissing unfair competition claim where not stated with specificity).

Last, Plaintiff only alleges past wrongful conduct. The statute applies to ongoing conduct; it is not intended to remedy past wrongs. Business and Professions Code section 17200 provides in relevant part that “unfair competition shall mean and include unlawful, unfair or fraudulent business *practice* ....” *See* Cal. Bus. and Prof. Code § 17200. (Italics added.) The Supreme Court has held that “practice” requires, at a minimum, ongoing conduct. *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal.3d 1147, 1169-1170 (1988). Relief under section 17200 is unavailable to remedy past misconduct. *Id.* Accordingly, Plaintiff’s Cal. Bus. & Prof. Code § 17200 claim fails and should be dismissed with prejudice.

**XII. PLAINTIFF’S FRAUD CLAIM FAILS BECAUSE PLAINTIFF HAS NOT ALLEGED THE CLAIM WITH SUFFICIENT PARTICULARITY.**

Plaintiff’s ninth claim is for fraud. *See* FAC ¶¶ 72-77. The elements of fraud are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996).

In order to plead fraud with particularity, the complaint must allege the time, place, and content of the fraudulent representation; conclusory allegations do not suffice. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Therefore, plaintiff “must state with particularity the circumstances constituting fraud.” Fed.R.Civ.P. 9(b). In other words, the plaintiff must include “the who, what, when, where, and how” of the fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.2003). “The plaintiff must set forth what is false or misleading about a statement, and why it is false.” *Decker v. Glenfed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994).

“Rule 9(b) does not allow a complaint to merely lump multiple defendants together but ‘require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-765 (9th Cir.2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F.Supp. 1437, 1439 (M.D.Fla.1998)). “In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, ‘identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme.” *Swartz*, 476 F.3d at 765 (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989)).

Plaintiff fails to allege the who, what, when, where and how of the purported fraud. *See* FAC ¶¶ 72-77. Additionally, Plaintiff fails to set forth what is false or misleading about any of the statements, and why it is false. *See* FAC ¶¶ 72-77. Plaintiff also fails to differentiate between the different defendants, and instead lumps all defendants together. *See* FAC ¶¶ 72-77.

**XIII. PLAINTIFF’S NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE PLAINTIFF HAS NOT ALLEGED ALL REQUIRED ELEMENTS AND BECAUSE THE CLAIM HAS NOT BEEN ALLEGED WITH SUFFICIENT PARTICULARITY.**

Plaintiff’s tenth claim is for negligent misrepresentation. *See* FAC ¶¶ 78-82. Negligent misrepresentation is a form of deceit, the elements of which are (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce the plaintiff’s reliance, (4) ignorance of the truth and justifiable reliance by the plaintiff, and (5) damages. *See Fox v. Pollack*, 181 Cal.App.3d 954, 962 (Cal. Ct. App. 1986).

Plaintiff’s negligent misrepresentation claim fails to allege that any of the Defendants made any misrepresentation without reasonable grounds for believing it to be true. *See* FAC ¶¶ 78-82. Moreover, for the same reasons as Plaintiff’s fraud claim fails for lack of particularity, Plaintiff’s negligent misrepresentation



1 claim fails. *See Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d 1101, 1141  
 2 (C.D.Cal. 2003).

3 **XIV. PLAINTIFF'S CLRA CLAIM FAILS BECAUSE PLAINTIFF DOES**  
 4 **NOT ALLEGE A CLAIM AGAINST OCWEN OR MERS**  
 5 **SPECIFICALLY, AND BECAUSE THE STATUTE DOES NOT**  
 6 **APPLY TO REAL PROPERTY.**

7 Plaintiff's eleventh claim is for violation of the Consumer Legal Remedies  
 8 Act (the "CLRA"). *See* FAC ¶¶ 83-91. First, Plaintiff violates Rule 8(a) in that  
 9 she fails to put Ocwen or MERS on notice of her claim. Plaintiff alleges that  
 10 "HOME LOAN" is a "person" within the meaning of the statute and "entered into  
 11 a 'transaction'" within the meaning of the statute. *See* FAC ¶¶ 86-87. However,  
 12 Plaintiff does not allege that either Ocwen or MERS is a "person" or entered into a  
 13 "transaction" within the meaning of the statute. *See* FAC ¶¶ 83-91. Thus, it is  
 14 unclear whether Ocwen or MERS is being held liable for a violation of the CLRA  
 in the first place.

15 Second, on its face, this statute applies to goods or services, and does not  
 16 apply to real property disputes. *See* Cal. Civ. Code 1770. There is no legal  
 17 authority for the proposition that foreclosure of real property is governed by  
 18 CLRA. *Civil Code* § 1761(d) states that "consumer" means an individual who  
 19 seeks or acquires by purchase or lease goods or services for personal, family, or  
 20 household purposes. Section 1761(a) defines "goods" as "tangible chattels" and  
 21 subsection (b) defines services as labor or services in connection with sale or repair  
 22 of goods. Here, it appears that the subject of this claim is the loan and a potential  
 23 loan modification. The CLRA does not apply to real property, as it only applies to  
 24 personal property, labor, or services. For this reason, the CLRA is inapplicable to  
 25 the purported transaction at issue.

26 Third, even assuming that the CLRA applies, in order to state a claim for  
 27 violation of CLRA, Plaintiff must allege that the defendant's actions are likely to

1 deceive a reasonable consumer. *See, Williams v. Gerber Products Co.*, 552 F2d  
 2 934, 938, (9th Cir. 2008). Plaintiff fails to allege any facts suggesting that either  
 3 Ocwen or MERS' conduct is likely to deceive a reasonable consumer. Thus,  
 4 Plaintiffs' allegations are insufficient to state a claim for violation of CLRA.

5 **XV. PLAINTIFF'S BREACH OF FIDUCIARY DUTIES CLAIM FAILS**  
 6 **BECAUSE NEITHER OCWEN NOR MERS IS A FIDUCIARY OF**  
 7 **THE BORROWER.**

8 Plaintiff's twelfth claim is for breach of fiduciary duties. *See* FAC ¶¶ 92-97.  
 9 The elements of a breach of fiduciary duty claim are (1) existence of a fiduciary  
 10 relationship; (2) breach of the fiduciary duty; and (3) damage proximately caused  
 11 by that breach. *Roberts v. Lomanto*, 112 Cal.App.4th 1553, 1562 (Cal. Ct. App.  
 12 2003). "The absence of any one of these elements is fatal to the cause of action."  
 13 *Pierce v. Lyman*, 1 Cal.App.4th 1093, 1101 (Cal. Ct. App. 1991).

14 Plaintiff's claim fails because neither Ocwen nor MERS has a fiduciary  
 15 relationship with Plaintiff, the borrower. "Absent special circumstances, a loan  
 16 transaction is at arms-length and there is no fiduciary relationship between the  
 17 borrower and lender." *Rangel v. DHI Mortgage Co., Ltd.*, 2009 WL 2190210, at  
 18 \*3 (E.D.Cal. July 21, 2009) (quoting *Oaks Management Corp. v. Superior Court*,  
 19 145 Cal.App.4th 453, 466 (Cal. Ct. App. 2006)).

20 In *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 476 (Cal. Ct. App.  
 21 1989), the court emphatically rejected the notion that lenders owe fiduciary duties  
 22 to a borrower. Those principles have since been extended to the logical conclusion  
 23 that there is no fiduciary duty of a loan servicer to a borrower. *See Yerington*  
 24 *Ford, Inc. v. Gerard Motors Acceptance Corp.* 359 F.Supp.2d 1075, 1092 (D.Nev.  
 25 2004). Moreover, since the Lender did not owe Plaintiff a fiduciary duty, it  
 26 follows that MERS also not owe Plaintiff a fiduciary duty. *Boles v. Merscorp, Inc.*  
 27 2009 WL 734133, at \*5 (C.D.Cal. Mar. 18, 2009).

28 In this case, Defendants do not owe Plaintiff a fiduciary duty. Ocwen is a

servicer and MERS is a nominee for the lender. Ocwen's status as a loan servicer is dispositive—it owes no fiduciary duty to a borrower, and the *Boles* decision holds that there is no fiduciary duty from MERS to a borrower because there is no underlying duty from the lender to the borrower. *See Boles*, 2009 WL 734133, at \*5. Accordingly, Plaintiff has not, and cannot, allege a breach of fiduciary duty claim against Defendants and this cause of action should be dismissed with prejudice.

**XVI. PLAINTIFF'S FINANCIAL ABUSE OF ELDERS CLAIM FAILS BECAUSE NEITHER OCWEN NOR MERS IS ALLEGED TO HAVE COMMITTED ANY WRONGDOING.**

Plaintiff's thirteenth claim is for financial abuse of elders. *See* FAC ¶¶ 98-100. Financial abuse occurs when a person takes or appropriates, or assists in taking or appropriating, the property of an elder adult for a "wrongful use or with intent to defraud" or by the use of "undue influence." Cal. Welf. & Inst.Code § 15610.30(a)(1)-(2). However, Plaintiff has not and cannot allege that either Ocwen or MERS specifically committed any wrongdoing. *See* FAC ¶¶ 98-100. *See Gwin v. Pacific Coast Financial Services*, 2010 WL 1691567, at \*7 (S.D.Cal. Apr. 23, 2010) (holding that failure to specify which defendant is being accused of violating the financial abuse of elders statute was grounds to dismiss the financial abuse of elders claim).

///

///

///

///

///

///

1 **XVII. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully requests that this Court  
3 enter an order dismissing Plaintiff's Complaint, in its entirety, for failing to state a  
4 claim upon which relief can be granted, and any further relief as this Court deems  
5 just and proper.

6 Dated: June 17, 2010

7 **HOUSER & ALLISON**  
8 A Professional Corporation

9  
10 s/ Brent A. Kramer

11 Brent A. Kramer  
12 Attorneys for Defendants  
13 Ocwen Loan Servicing, LLC,  
14 erroneously sued as OCWEN  
15 FINANCIAL CORPORATION, and  
16 MORTGAGE ELECTRONIC  
17 REGISTRATION SYSTEMS, INC.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

